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IN THE
Supreme Court of the United States

October Term, 1942.

No. 922

**TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL
RAILROAD OF NEW ORLEANS,**

Petitioner,

versus

KORA T. EVENS, WIDOW OF JAMES W. EVENS,

Respondent.

**PETITION OF TEXAS PACIFIC—MISSOURI PACIFIC
TERMINAL RAILROAD OF NEW ORLEANS FOR
WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT, AND SUPPORTING BRIEF.**

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**IN THE
SUPREME COURT OF THE UNITED STATES**

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No.

**TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL
RAILROAD OF NEW ORLEANS,
Petitioner,
versus**

**KORA T. EVENS, WIDOW OF JAMES W. EVENS,
Respondent.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

The petitioner prays that a writ of *certiorari* issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on February 17, 1943, reversing with directions, the judgment of the District Court of the United States for the Eastern District of Louisiana, entered on April 1st, 1942.

I.

OPINIONS BELOW.

The opinion of the Court below, filed on February 17, 1943, is not yet reported but is found in the printed record beginning at page 62.

II.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner is the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans. The respondent, Mrs. Kora T. Evens, is a native of Alabama. Mrs. Evens, an elderly woman, arrived by train at the station operated by petitioner in the city of New Orleans, Louisiana, on the morning of June 16, 1939 (R. 19). She had undertaken a journey from Dallas, Texas, to Tuskegee, Alabama, and was traveling on a pass by one of the terms of which she agreed to assume all risk of injury to her person (R. 19, 51). The petitioner and respondent are agreed that by reason of respondent's assumption of this risk, she may recover only for injuries resulting from wilful acts or wanton negligence on the part of petitioner.

After Mrs. Evens descended from the train, she followed the red-cap, who was taking her bags toward the taxi stand (R. 20). As she passed through the gate separating the tracks from the concourse leading to the waiting rooms, she was struck a glancing blow by a loaded bag-

gage cart, pushed by another red-cap, a servant of your petitioner (R. 19, 27). As a result of the blow, she fell to the ground and was injured (R. 21, 22). Mrs. Evens was at no time aware of the approach of the baggage carrier or of her imminent injury (R. 21). Two bystanders in the concourse saw the carriage approach Mrs. Evens and shouted warnings, just as it struck her (R. 27, 45). There is no conflict in the testimony upon these events. Nor is there any conflict in the testimony to the effect that the red-cap saw Mrs. Evens when he was twenty-five feet from her (R. 36); that he was not aware that Mrs. Evens was lame and walking with a stick (R. 37, 38); that he was at no time actually aware that Mrs. Evens was in danger (R. 37); that after seeing Mrs. Evens the first time, he did not see her again but devoted his attention entirely to the task of seeing that the sides of his cart cleared the gate (R. 36); that the red-cap was at all times pushing the baggage buggy slowly (R. 27, 36, 46).

The definition of wanton negligence accepted by the District Court and the Circuit Court of Appeals and, for practical purposes identical with the definitions urged by both petitioner and respondent, appears in the language of the Circuit Court of Appeals, as follows: "Wanton negligence may be generally defined as an act (or failure to act where there is a duty to act) in reckless disregard of the rights of another, coupled with consciousness that injury is a probable consequence of the act or omission" (R. 64).

At the conclusion of the trial both parties moved for a directed verdict, but rulings upon the motions were re-

served, the cause was submitted to the jury and a verdict for respondent was returned. Petitioner thereupon moved for judgment *non obstante veredicto* and, in the alternative, for a new trial. Both motions were granted, judgment was entered, dismissing the suit, and respondent appealed. The United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment appealed from and remanded the cause to the District Court. A petition for rehearing was denied and this petition for a writ of *certiorari* is now filed.

III.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938. (28 U. S. C. 347.)

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was filed on February 17, 1943; petition for rehearing was filed on March 3, 1943; rehearing was denied on March 11, 1943. Application for a stay of mandate pending application in this Court for a writ of *certiorari* was made on March 16, 1943 and an order staying the mandate for thirty days, pending the application for writ of *certiorari* in this Court, was entered on March 19, 1943.

IV.

QUESTIONS PRESENTED.

Two questions are presented, as follows:

(1) Should not judgment be given, as a matter of law, in favor of defendant,

(a) where the plaintiff has the burden of proof, and

(b) where there is no conflict in the testimony and it does not establish objectively the elements of such proof, and

(c) where inconsistent inferences may be equally drawn from this unconflicting testimony and the plaintiff has thereby failed to sustain the burden of proof?

(2) Should not judgment be given as a matter of law in favor of defendant where the plaintiff's case is based upon an inference or inferences and there are undisputed facts inconsistent with such inferences?

V.**REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.**

The United States Circuit Court of Appeals for the Fifth Circuit has herein decided a case involving important principles of law governing trials by jury in the Federal Courts in direct conflict with the rules prevailing

in the jurisdictions of other Circuit Courts of Appeal and now expressly declared by the Supreme Court of the United States in the case of *Pennsylvania R. Co. vs. Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391, (1933).

VI.

CONCLUSION.

WHEREFORE, it is respectfully prayed that this petition for a Writ of *Certiorari* to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on February 17, 1943, in the above entitled cause, be granted.

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